COMMONWEALTH OF KENTCKY
SUPREME COURT

Case No. 2014-SC-000108-D
(2012-CA-002154)

Appeal from Franklin Circuit Court
Civil Action No. 11-CI-1047

JERRY JAMGOTCHIAN **APPELLANT**

v. **BRIEF OF APPELLANT JERRY JAMGOTCHIAN**

KENTUCKY HORSE RACING COMMISSION et al. **APPELLEES**

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief Of Appellant Jerry Jamgotchian was mailed, postage prepaid, to: Susan B. Speckert, Esq., 4063 Ironworks Pike, Building B, Lexington, Kentucky 40511; and Robert M. Watt Esq., Anthony Phelps, Esq., and Monica H. Braun, Esq., 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; Hon. Phillip Shepherd, Judge, Franklin Circuit Court, Judicial Bldg. 669 Chamberlin Ave., Frankfort, Kentucky 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on this the 13th day of January, 2015.

COUNSEL FOR APPELLANT

INTRODUCTION

This case involves the Appellant Jerry Jamgotchian's ("Jamgotchian") challenge to the constitutionality of 810 KAR 1:015, Section 1 at Article 6(a)-(b) ("Article 6" or "the Regulation"), an administrative regulation enacted by the Appellee Kentucky Horse Racing Commission ("KHRC") to prevent purchasers of Thoroughbreds at a Kentucky claiming race from racing their claimed horses outside of Kentucky for a prescribed time period. Jamgotchian respectfully requests that the Supreme Court (1) reject the conclusion of the Trial Court and Court of Appeals that the Regulation is constitutional under the Commerce Clause of the United States Constitution; and (2) rescind and permanently enjoin further enforcement of the unconstitutional provisions of the Regulation by the KHRC.

STATEMENT CONCERNING ORAL ARGUMENT

Given the magnitude and potential impact of the constitutional question before the Court on Discretionary Review, Jamgotchian respectfully requests that the Court schedule this matter for Oral Argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Because no discovery or oral argument has taken place in this matter, the factual record is limited to the Parties' respective statements of fact and supporting Affidavits included with their Cross-Motions for Summary Judgment, the factual background contained in the trial court's November 29, 2012 Opinion and Order (the "Trial Order"), and the factual background contained in the Court of Appeals' February 7, 2014 Order Affirming the ruling of the trial court (the "Appellate Order"). Both Orders are included in the Appendix as Exhibits A and B, respectively. Accordingly, citations to the Record are simply references to the Parties' court filings (including supporting Affidavits) and the Orders of the trial court and Court of Appeals.

I. FACTUAL BACKGROUND

A. The Nature And Effect Of Article 6.

The Kentucky General Assembly created the KHRC as "an independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky." Ky. Rev. Stat. Ann. 230.225(1). The KHRC has the authority to enact administrative regulations that prescribe the terms under which horse racing shall be conducted in the Commonwealth. See Ky. Rev. Stat. Ann. 230.260(8) (the KHRC "shall have full authority to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted in this state [.]").

Pursuant to this authority, the KHRC enacted Article 6, which provides collectively as follows: "A horse claimed in a claiming race shall not be transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another

claiming race." 810 KAR 1:015, Section 1 at Article 6(a). "Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse shall not race elsewhere until the close of entries of the meeting at which it was claimed." Id. at Article 6(b) (emphasis added). In addition to the absolute prohibition of sale and transfer contained in subsection (a) of the Regulation, the practical effect of subsection (b) is that Thoroughbred horses claimed in a Kentucky claiming race are ineligible to race outside of Kentucky until the meet has closed, while nevertheless being permitted to race immediately within the Commonwealth. Id. The period of extraterritorial ineligibility contained in the Regulation is referred to in the racing industry as "jail time" or "claiming jail," because the owner of a newly claimed horse in Kentucky is prohibited from entering his or her horse in races outside of Kentucky until this period of ineligibility/"jail time" has expired – i.e., until the Kentucky racing meet is over. According to KHRC regulatory policy, persons who violate Article 6 are subject to fines, license suspension, and other sanctions. See generally, 810 KAR 1:028.

Jamgotchian claims that Article 6 discriminates against and impermissibly burdens interstate commerce in several ways. First, the Regulation contains explicit restrictions on the sale and transfer of newly claimed horses, thereby directly impeding the free flow of these horses in interstate commerce. See 810 KAR 1:015, Section 1 at Article 6(a). Second, the Regulation permits owners of newly claimed Thoroughbreds to race their horses at the Kentucky meet in which they were claimed (or at another Kentucky race track after steward approval), while simultaneously prohibiting those horses from racing elsewhere in the United States. See Id. at Article 6(b). For example, if a Thoroughbred is claimed at Churchill Downs, an owner can immediately enter that

horse to race at Churchill Downs (thereby economically benefiting a private entity inside Kentucky, as well as providing tax benefits to the Commonwealth) while simultaneously being prohibited from racing the horse at any other track in the United States (thereby denying economic benefits to out-of-state interests). As described below, this is exactly what happened to Jamgotchian.

B. Article 6 Impedes Jamgotchian's Commercial Racing Activities Outside The Commonwealth Of Kentucky.

On May 21, 2011, Jamgotchian claimed the horse ROCHITTA for $42,400.00 in a claiming race at Churchill Downs ("Churchill"), a privately owned racetrack in Louisville, Kentucky. (R.A. at 75). The corresponding Churchill meet began on April 30, 2011 and ended on July 4, 2011. Accordingly, based on the requirements of Article 6, Jamgotchian was restricted from racing ROCHITTA at any racetrack outside Kentucky until after this meet concluded on July 4, 2011. (R.A. at 76).

Despite the "jail time" imposed by the Regulation, Jamgotchian chose to submit ROCHITTA for entry at several races in Pennsylvania scheduled for June of 2011. On May 31, 2011, Penn National Race Course Racing Secretary David F. Bailey ("Penn National" and "Bailey," respectively) noticed that the Appellant tried to enter ROCHITTA in a June 4, 2011 race at that facility. (Bailey Affidavit, R.A. at 141). This prompted Bailey to contact Ben Huffman ("Huffman"), Racing Secretary at Churchill, to obtain more details concerning Kentucky's "jail time" requirements. Id. Huffman informed Bailey that pursuant to the Regulation, a Thoroughbred claimed in Kentucky is not permitted to race elsewhere until entries are taken for the last day of the meet where the horse was claimed. Id. at 142.

Based on this information, and upon learning that the meet where Jamgotchian claimed ROCHITTA did not end until July 4, 2011, Bailey refused the entry of ROCHITTA to race at Penn National, and Jamgotchian forfeited his entry fee. (Bailey Affidavit, R.A. at 141-42). Soon afterward, Bailey told Jamgotchian that ROCHITTA was denied entry due to the restrictions imposed by Article 6. (Bailey Affidavit, R.A. at 141-42).

While the Parties dispute the full extent of the KHRC's actions to enforce the Regulation (Jamgotchian claims that KHRC agents threatened him and his trainer with fines and license suspension based on knowledge of his out-of-state activities, which the KHRC denies), the KHRC admits that it told Jamgotchian that Article 6 prohibited him from racing ROCHITTA outside the Commonwealth of Kentucky. (Affidavit of John Veitch, former KHRC Chief Racing Steward ("Veitch"), R.A. at 148-49, stating "[he] told Mr. Jamgotchian that it would be a violation of [Article 6] if his filly raced at Penn National as Mr. Jamgotchian proposed"). Similarly, Bailey admits that Penn National denied Jamgotchian's entry of ROCHITTA on at least one occasion as a direct result of the prohibition contained in the Regulation, causing Jamgotchian to forfeit his entry fee. (Bailey Affidavit, R.A. 141-42).

II. PROCEDURAL HISTORY IN THE COURTS BELOW

On July 13, 2011, Jamgotchian filed suit against the KHRC and its chief agents in Franklin Circuit Court seeking a declaration that Article 6 violates the "negative" aspect of the Commerce Clause that denies the States the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce (the "Dormant Commerce Clause"). (See generally Verified Complaint For Declaratory And Injunctive Relief (the

"Complaint"), R.A. at 3-17). Jamgotchian also sought an injunction to prevent the KHRC and its agents from taking further action to implement or enforce Article 6 against him and others. Id. Because the constitutionality of Article 6 is a matter of law, the parties submitted the case for decision on Cross-Motions for Summary Judgment and supporting Memoranda. (See Notice of Submission of Case for Final Adjudication, R.A. 246).

Upon reviewing the Parties' Cross-Motions for Summary Judgment, the trial court considered whether Jamgotchian had standing to seek declaratory and injunctive relief, and whether Article 6 violates the Commerce Clause of the United States Constitution. (See generally Order, R.A. at 256-66). The trial court resolved the standing issue in the affirmative, agreeing that Jamgotchian had "alleged a sufficient deprivation of his liberty of action and financial interests to allow him to challenge [Article 6][,]" and that "an adequate case or controversy [exists] to ensure that the parties are adversarial and have a concrete stake in the outcome . . ." (Id., R.A. at 257-58) (citing Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Revis v. Daugherty, 287 S.W. 28 (Ky. 1926)). However, the court overruled Jamgotchian's constitutional challenge, finding that he "failed to carry his burden to demonstrate that the challenged regulation imposes a burden on interstate commerce that is a violation of the Commerce Clause." (See Order, R.A. at 266).

The Court of Appeals affirmed the ruling of the trial court as to the constitutionality of Article 6,[1] and turned its decision on an analysis of whether Article 6

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[1] The Court of Appeals also affirmed the ruling of the trial court concerning the issue of standing, and agreed that the matter presents a justiciable controversy in which Jamgotchian may seek repeal of Article 6 and an injunction preventing its enforcement by the KHRC. The KHRC has not attacked the Court of Appeals' resolution of this issue, and ostensibly, the issue is not before

pertained to a traditional government function. See Appellate Order at p. 6, attached as Exhibit B. While the Supreme Court of the United States has "clearly ruled out the traditional government function test as a dispositive rule of adjudication for Commerce Clause cases[,]"[2] the Court of Appeals did exactly that: it exempted Article 6 from the appropriate level of Constitutional scrutiny based on a judicial appraisal of whether the regulation of Horse racing by the KHRC constitutes a traditional government function, even though Jamgotchian advised the Court of Appeals of clear binding authority rejecting this analysis. See generally, Appellate Order at pp. 6-12 (". . . the first step in determining the constitutionality of the Regulation is deciding whether it involves a traditional government function."); but see Appellant's Reply Brief at pp.2-3 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985), wherein the Supreme Court of the United States rejected ". . . as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'").

While the KHRC and the Court of Appeals relied on Dep't of Revenue v. Davis, 553 U.S. 328 (2008) for the notion that Garcia, supra has somehow been supplanted and that distinguishing between traditional and non-traditional governmental functions is a valid determinative factor for analyzing discriminatory regulations, they ignored Justice Souter's own words in Davis in which he unmistakably clarifies the issue to the contrary:

> The point of asking whether [a] challenged governmental preference operate[s] to support a traditional public function [is] not to draw fine distinctions among governmental functions, but to find out whether the

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the Court on Discretionary Review. In the event the Court wishes to review Jamgotchian's position concerning standing, it is hereby referred to pp. 8-11 of Jamgotchian's Brief on Appeal.

2 See Greffet, John J., *Factoring In Tradition: The Proper Role of the Traditional Government Function Test,* St. Louis Univ. Law Journal, Vol. 53 at p. 875 (2009).

> preference [is] for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local. Under [United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 38 (2007), see additional discussion infra,] governmental public preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other . . . [b]ecause this is the distinction at which the enquiry about traditional government activity is aimed, it entails neither tautology nor the hopeless effort to pick and choose among legitimate governmental activity that led to Garcia[.]

See Davis, supra, 553 U.S. at n. 9. Of gravest concern to Jamgotchian is that, while improperly favoring local private interests, neither the trial court nor the Court of Appeals ever gave proper regard to the relevant inquiry identified by Justice Souter in Davis: whether the preference created by the regulation at issue is for the benefit of a government fulfilling governmental obligations, or for the benefit of favored private interests, favored because they were local. Instead, this critical and significant point was completely overlooked, and despite the KHRC's unequivocal admission[3] that the Regulation is designed to benefit the private local interests associated with the Kentucky racing industry, the Court of Appeals allowed the Regulation to survive.

III. ISSUES PRESENTED ON DISCRETIONARY REVIEW

On discretionary review, Jamgotchian respectfully requests that this Court (1) reverse the Opinion of the Court of Appeals, which affirmed the ruling of the Franklin Circuit Court that the Regulation is constitutional under the Commerce Clause of the United States Constitution; and (2) set aside and permanently enjoin further enforcement of the unconstitutional provisions of the Regulation by the KHRC.

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3 Specifically, the KHRC admits that the Regulation is designed to prevent ". . . the uncontrolled transfer of thoroughbred horses out of Kentucky in order to ensure larger fields of horses[;]" and that "[l]arger fields resulting from the Regulation generate more revenue at Kentucky race tracks . . . cumulatively, this leads to higher purses for owners . . . which in turn translates to additional revenues for farm wages, equipment, and other improvements. See Appellees' Brief at pp. 21-22.

Because this matter concerns review of a grant (and subsequent affirmation) of a Summary Judgment, the Court should consider whether the record, when examined in its entirety, "shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See Stilger v. Flint, 391 S.W.3d 751 (Ky. 2013). "Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, the [appellate court] generally review[s] the grant of summary judgment without deference to either the trial court's assessment of the record or its legal conclusions." Hammons v. Hammons, 327 S.W.3d 444, 448 (Ky. 2010).

ARGUMENT[4]

I. THE TRIAL COURT AND COURT OF APPEALS INCORRECTLY CONCLUDED THAT ARTICLE 6 IS CONSTITUTIONAL

A. The Dormant Commerce Clause.

The Commerce Clause of the United States Constitution provides that Congress has the power to "regulate Commerce with foreign Nations, and among the several States [.]" See U.S. Const., Art. I, § 8, cl. 3. While this text is worded as a grant of authority to Congress to regulate Commerce among the several States, the Commerce Clause has long been understood to embody a "restriction on permissible state regulation," commonly referred to as the "dormant" Commerce Clause. See Hughes v. Oklahoma, 441 U.S. 322, 326 (1979); Davis, supra, 553 U.S. at 337 (2008). The dormant Commerce Clause has been interpreted to invalidate local laws that impose economic or commercial barriers or

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4 Ky. R. Civ. P. 76.12(4)(c)(v) requires a statement at the beginning of the Argument showing whether the issue before the Court was properly preserved for review. The sole issue presented by this case – the constitutionality of Article 6 – is an issue of law and was properly preserved by Jamogotchian through his timely Appeal and Motion for Discretionary Review following the trial court and Court of Appeals' respective decisions upholding the Regulation.

"discriminate against an article of commerce by reason of its origin or destination out of State." C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994). "The dormant Commerce Clause is driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" Davis, supra at 553 U.S. 337-38 (quoting New Energy Co. of Ind. v. Limbach, 496 U.S. 269, 273-74 (1988)).

The Supreme Court of the United States has adopted a two-tiered analysis to evaluate challenges to laws under the dormant Commerce Clause. See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79 (1986). Under the first step, a court must determine whether ". . . a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests[.]" Id.

A state regulation can discriminate against out-of-state interests in three different ways: (1) facially, (2) purposefully, or (c) in practical effect. See Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 644 (6th Cir. 2010); see also Healy v. Beer Inst., 491 U.S. 324, 332 (1989) ("[A] state law that has the "practical effect" of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."). In instances of discrimination based on "practical effect," the relevant inquiry is whether "the practical effect of the regulation is to control conduct beyond the boundaries of the State." Brown-Forman, supra 476 U.S. at 579. Regulations that discriminate facially, purposefully, or in practical effect are generally considered per se invalid and are struck down without further inquiry. Id.

"When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, the [United States Supreme Court] . . . examines whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Brown-Forman, supra at 579 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). This second tier in the analysis is referred to as the "Pike balancing test," and again, only applies in instances where the effect on interstate commerce imposed by a regulation is incidental – not situations where a regulation operates extraterritorially or discriminates against commerce facially, purposefully, or in practical effect.

B. The Applicable Burdens Of Proof.

1. Jamgotchian's Burden Of Proof.

Jamgotchian bears the initial burden of showing that Article 6 is discriminatory or impermissibly burdens interstate commerce, therefore violating the dormant aspect of the Commerce Clause. As set forth by the Supreme Court in Oregon Waste Sys., Inc. v. Dept. of Envt'l Quality, 511 U.S. 93 (1994), discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid." Id. at 99. (citing Chemical Waste Management, Inc. v. Hunt, 504 U.S 334, 344 (1992)). Furthermore, the Supreme Court in Hughes v. Oklahoma, 441 U.S. 322 (1979) noted that facial discrimination by itself may be a fatal defect, regardless of the State's purpose, and that "[a]t a minimum such facial discrimination invokes the strictest scrutiny . . ." Id. at 337.

When assessing the Regulation for impermissible discrimination, the Court may – but is not required – to question whether the KHRC intended it to be discriminatory. "The evil of protectionism can reside in legislative means as well as legislative ends," and therefore "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Resources, et al., 504 U.S. 353, 360 (1992).

2. The KHRC's Burden Of Proof.

If Jamgotchian establishes that Article 6 is discriminatory or impermissibly regulates conduct beyond the boundaries of Kentucky, the burden shifts to the KHRC to prove that the "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." Fort Gratiot, supra at 359 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988)). The Regulation cannot be upheld unless no reasonable alternatives exist that would adequately advance or promote such interests without discriminating against interstate commerce. Hughes, supra at 336-37; C&A Carbone, supra at 393; Maine v. Taylor, 477 U.S. 131, 138 (1986) (holding that "the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means."). The unavailability of nondiscriminatory means for advancing the State's interest must be justified through "concrete record evidence," not mere speculation that the discrimination is justified. See Granholm v. Heald, 544 U.S. 460, 492-93 (2005); Fort Gratiot, supra at 359.[5]

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[5] The United States Supreme Court has only upheld a discriminatory regulation under the narrow circumstance where a complete factual record reveals a lack of viable alternatives for the State,

C. The Regulation Impermissibly Discriminates Against And Burdens Interstate Commerce.

At its most fundamental level, the Commerce Clause forbids the States from segregating the Nation's commerce into the disparate and disunited economies that existed under the Articles of Confederation. See James Madison, Preface to Debates in the Convention of 1787, in 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (1911) ("[W]ant of a general power over commerce led to an exercise of this power separately, by the States, w[hi]ch not only proved abortive, but engendered rival, conflicting and angry regulations."). Here, by the KHRC's own admission, the Commonwealth has crafted a regulation that interferes with commerce by preventing the "transfer of Thoroughbred horses out of Kentucky . . . to ensure that Thoroughbred horses are available to race in the Commonwealth." (Cross-Motion for Summary Judgment, R.A. at 125). As described in detail below, this is an impermissible attempt to extend state regulatory authority to conduct occurring wholly outside the Commonwealth's borders, in an effort to benefit the local, private interests of the Kentucky Thoroughbred industry.

1. The Regulation Is Facially Discriminatory.

In considering whether a law violates the dormant Commerce Clause, the Court must first address whether it discriminates on its face against interstate commerce. See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 38 (2007) (citations omitted). "[D]iscrmination against interstate commerce in favor of

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and where the regulation is unrelated to economic protectionism. For example, in Maine v. Taylor, supra, 477 U.S. 131 (1986), the Court allowed a regulation that placed a total ban on the importation of baitfish, where such importation could harm Maine fish through the introduction of non-native parasites. The State proved through significant expert testimony that there was no way for it to protect a natural resource – its fish – absent the importation ban.

local business is per se invalid if it provides "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." United Haulers, supra 550 U.S. at 338 (internal quotation marks and citation omitted).

It is not necessary to look beyond the text of Article 6 to determine that it significantly benefits in-state economic interests and unquestionably burdens out-of-state economic interests. Specifically, under the Regulation, owners who claim Thoroughbred racehorses in Kentucky can only race their horses in Kentucky, at a private Kentucky racetrack, paying entry fees that only benefit local, private economic interests (the private tracks where the horses race, the employees of such facilities, the parties who collect the entry fees) until the "claiming jail" period has expired. In the case of ROCHITTA, Jamgotchian was prohibited from racing his horse in any State but Kentucky for a period beginning April 30, 2011 and ending July 4, 2011. (R.A. at 81). In contrast, the plain terms of Article 6 allowed Jamgotchian to race ROCHITTA only and exclusively in Kentucky without restriction at the same meet in which he claimed the horse. See 810 KAR 1:015, § 1, Article 6(b).

The outright discrimination of Article 6 against interstate commerce is prohibited by the Commerce Clause. States cannot adopt angry or conflicting regulations like Article 6 that unilaterally carve themselves out of the national economy if a system of interstate commerce is to remain intact. See generally C&A Carbone, supra 511 U.S. at 391 (stating that the United States Constitution, through the Commerce Clause, "invalidates local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state.") (emphasis added). Because Article 6 exclusively favors in-state private business (in-state horse racing and

horse racing facilities) over out-of-state private business (out-of-state horse racing and horse racing facilities) and prohibits horse racing anywhere outside the Commonwealth, it is obviously discriminatory on its face and per se invalid. See United Haulers, supra 550 U.S. at 338.

2. The Regulation Has A Discriminatory Purpose And Effect.

The KHRC admits that one of the purposes of the Regulation is to prevent the uncontrolled transfer of Thoroughbred horses out of Kentucky to ensure that Thoroughbred horses are available to race in the Commonwealth. (See Cross-Motion for Summary Judgment, R.A. at 125). Both the trial court and Court of Appeals emphasized this purpose in their respective Orders, writing that the Regulation "helps to 'ensure larger fields of horses,' improving the welfare of Kentuckians involved in the horse and tourism industries . . . [and] helps to generate more revenue at racetracks through entry fees, wagers, and retail sales." (Order, R.A. at 264-65; Appellate Order at p. 7). The trial court further acknowledged that all of the stated benefits of the Regulation are "economically related[.]" Id. at 265.

In other words, the stated purpose of Article 6 is to prevent private parties like Jamgotchian from engaging in interstate commerce (racing their horses at race tracks outside of Kentucky) in order to preserve the economic viability of a local, private industry: the Kentucky Thoroughbred horse racing industry. The Supreme Court – in binding precedent that has never been overruled – has clearly held that the States are without the power to restrict the free flow of trade or prevent privately owned articles of trade from being used in interstate commerce on the grounds that "[such articles] are required to satisfy local demands or because they are needed by the people of the State."

Hughes, supra, 441 U.S. at 333, n. 12 (citing Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928)). Therefore, the KHRC and the courts below cannot in any way justify the Regulation on the basis that the "jail time" restriction is necessary to "nurture and promote the market for race horses, and ensure that the public as a whole will benefit from the stronger fields and more competitive races that will result." (Order, R.A. at 260-61). Rather, its discriminatory purpose renders it per se invalid, and any rationalization that the Regulation is an exercise of the "police power" is merely a circular ruse, because almost any state law could be justified in this manner. Brown-Forman, supra 476 U.S. at 579; see generally Davis, 553 U.S. at n. 9.

Finally, the practical effect of Article 6 is also discriminatory in violation of the Commerce Clause. A regulation is discriminatory in effect if "the claimant [can] show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation." See Int'l Dairy, supra, 622 F.3d at 648. Unlawful discrimination is also present if the "practical effect of the regulation is to control conduct beyond the boundaries of the State." Brown-Forman, supra at 579.

Here, the record demonstrates that the Regulation creates disparate treatment of in-state and out-of-state economic activity by permitting racing of horses at private tracks in Kentucky while simultaneously prohibiting the racing of horses at tracks outside the State. As a practical matter, this creates a scenario in which owners must benefit local Kentucky citizens and Kentucky businesses (the racetrack, its vendors, and various support personnel throughout the local racing market) if he or she wants to race their horse during the substantial "jail time" period prescribed by the Regulation. Simultaneously, other States are denied these economic benefits from owners, like

Jamgotchian, who are prohibited from racing their newly claimed horses outside of Kentucky on more favorable economic terms.[6] In essence, owners whose business involves national participation in claiming races are illegally walled off from interstate trade to ensure the viability of a local industry. See generally Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 573 (1997) ("if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.")

By holding certain Kentucky Thoroughbred horses hostage for racing only within the Commonwealth, the Regulation "overtly blocks the flow of interstate commerce at the State's borders." Hughes, supra, 441 U.S. at 336-37. This is economic protectionism in its most transparent form, and clearly meets the definition of discrimination against interstate commerce set forth in the Supreme Court's jurisprudence. See Id.; Oregon Waste Sys., Inc., supra, 511 U.S. at 98-99.

3. The Regulation Has Impermissible Extraterritorial Reach.

The Regulation is also unconstitutional because the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." Healy, supra, 491 U.S. at 336. The relevant inquiry is whether the "practical effect of the regulation is to control conduct beyond the boundaries of the State." Id. (citing Brown-Forman, supra,

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6 For example, without the restrictions imposed by Article 6, Jamgotchian and other persons similarly situated could choose to race claimed Thoroughbreds in many other states that pay higher purses; require lower entry fees; pay appearance, participation, and shipping fees; provide bonus enhancements; or provide other significant economic benefits which are far superior to the opportunities available in the Commonwealth of Kentucky.

476 U.S. at 579). This type of extraterritorial effect renders a law "virtually per se invalid." Int'l Dairy, supra, 622 F.3d at 646.[7]

An analysis of the extraterritorial effect of the restrictions contained in Article 6 also entails consideration of "how the challenged [regulation] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." Healy, supra, 491 U.S. at 336. As described below, Article 6 is an invalid extraterritorial regulation because it creates a "serious impediment to the free flow of commerce." Southern Pac. Co. v. Arizona, 325 U.S. 761, 775 (1945).

Specifically, because the owner of a newly claimed Kentucky Thoroughbred is prohibited from racing the horse outside of Kentucky for a prescribed time period, the Regulation has an obvious and direct extraterritorial effect on the owner of that horse – an effect that the KHRC fully admits. (See Cross Motion for Summary Judgment, R.A. at 125, stating that the Regulation is designed to prevent the transfer of horses outside of Kentucky and to ensure that there are enough horses in Kentucky to preserve the vitality of the Kentucky horse racing industry). Because of the risk of fines, license suspension, and entry fee forfeiture imposed by the Regulation, Article 6 knowingly punishes those owners who want to engage in commerce beyond the borders of the Commonwealth during the period of "jail time."

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7 In addition to challenging Article 6, Jamgotchian previously filed a similar legal action against the California Horse Racing Board (the "CHRB") to overturn that State's "jail time" regulation. In that action, after a determination by the California Attorney General in an informal opinion (the "California Opinion") that the California "jail time" restrictions violated the Commerce Clause, the CHRB immediately and voluntarily ceased enforcement of the offending regulation. Jamgotchian cited and attached the California Opinion in support of his Motion for Summary Judgment, and the extraterritoriality analysis contained herein largely mirrors that of the California Opinion previously cited by Jamgotchian. (See Motion for Summary Judgment, R.A. at 77; California Opinion, R.A. at 89-93).

Therefore, it is undeniable that the Regulation has the effect of controlling commercial activity occurring wholly outside the boundaries of Kentucky in direct violation of the Commerce Clause. See Healy, supra, 491 U.S. at 335-337 ("the Commerce Clause . . . precludes the application of a state statute occurring wholly outside the boundaries of the State's borders, whether or not the commerce has effects within the State . . ."). Moreover, other States imposing a similar, or perhaps conflicting, restriction on the out-of-state racing of horses claimed in their States could lead to the very inconsistent projection of one State's regulatory regime into the jurisdiction of another State. As set forth in Healy, supra, this is exactly the set of circumstances the Commerce Clause is designed to prevent. See Id. 491 U.S. at 335-37 (a "statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.").[8]

4. The KHRC Has Not Provided Concrete Record Evidence Of Nondiscriminatory Alternatives To The Regulation.

When a regulation discriminates against interstate commerce or impermissibly regulates conduct occurring outside the State, the burden shifts to the State to prove that the "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." Fort Gratiot, supra at 359 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988)). The Regulation cannot be upheld unless there are no

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8 Any suggestion by the KHRC that the "extraterritoriality doctrine" described in this section has been supplanted, overruled, or otherwise held invalid by the Supreme Court should be ignored. While some Circuits have questioned the doctrine, it remains binding Supreme Court precedent, and has been applied by the 6th Circuit as recently as 2013 to render a statute invalid under the dormant Commerce Clause. See generally Am. Bev. Ass'n v. Snyder, 700 F.3d 796 (6th Cir. Mich. 2013).

reasonable alternatives that would adequately advance or promote such interests without discriminating against interstate commerce. Hughes, supra at 336-37; C&A Carbone, supra at 393; Maine v. Taylor, 477 U.S. 131, 138 (1986). The unavailability of nondiscriminatory means for advancing the State's interest must be justified through "concrete record evidence," not mere speculation that the discrimination is justified. See Granholm v. Heald, 544 U.S. 460, 492-93 (2005); Fort Gratiot, supra at 359.

In its Order, the trial court states that "neither party has suggested that there are more reasonable alternatives [to the Regulation,]" and it refused to "speculate on any potential alternatives . . ." (Order, R.A. at 265). While this is not entirely accurate – Jamgotchian devoted an entire section of his Motion for Summary Judgment to discuss "nondiscriminatory alternatives for advancing Kentucky's interests"[9] – the trial court is correct that the KHRC has provided no concrete record evidence concerning the unavailability of nondiscriminatory means for ensuring that enough horses remain in Kentucky to support a healthy local racing industry. In fact, the KHRC admits as much, claiming that "[b]ecause the Regulation does not discriminate against interstate commerce, the KHRC is not required to demonstrate that the Regulation 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" (See Reply Memorandum in Support of Cross-Motion

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9 See Motion for Summary Judgment, R.A. at 84: "Because Thoroughbred horse racing is primarily an economic activity in which private owners and spectators participate for economic gain, the Commonwealth could have chosen to implement rules and regulations which make horse racing in Kentucky more appealing and economically competitive when compared to other states. Entrance fees could be reduced to encourage racing in Kentucky; purses could be increased; wagering technology could be improved; racetracks could offer other forms of entertainment during and after their race meets; horse races could be sponsored by companies in an effort to bring more people to the track; the onerous 6% claiming tax could be eliminated or reduced; more racing days could be granted by the KHRC; and other tax rates and rules of racing could all be adjusted so as to make Kentucky a more economically welcoming forum for owners to race their newly claimed Thoroughbreds."

for Summary Judgment, R.A. at 243). Accordingly, the KHRC did not meet the burden required to rebut the per se invalidity of the Regulation.

5. The Regulation Is Not Subject To The *Pike* Balancing Test Or Any Potential Exception That Saves It From *Per Se* Invalidity.

While the analytical framework underlying the Orders of the lower courts is not particularly well defined, they appear to at least partially justify the Regulation on the basis that it does not discriminate on its face and is therefore subject to analysis under the Pike balancing test. (Order, R.A. at 263; Appellate Order at pp. 11-12). Both Courts also suggest that the Regulation is not susceptible to standard dormant Commerce Clause scrutiny because it concerns a "traditional government function," a highly flawed analysis which is refuted in detail below. (Id., R.A. at 259; Appellate Order at pp. 6). In any event, neither justification cited by the trial court or Court of Appeals is applicable to the Regulation, and the courts' reasoning must be rejected.

a. The *Pike* Balancing Test Does Not Apply Here.

The Supreme Court has provided two tests to assess whether a regulation violates the dormant Commerce Clause. See City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). The first test holds that regulations that discriminate against interstate commerce or regulate conduct occurring outside the State's borders are per se invalid. See Oregon Waste, supra, 511 U.S. at 99. However, in instances where a statute regulates evenhandedly[10] to promote a legitimate local public interest (rather than private

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10 Article 6 does not regulate evenhandedly. While the KHRC may disagree on the grounds that all persons who claim Thoroughbreds in Kentucky are subject to the Regulation, the intended effect of Article 6 is to benefit the local racing market – a private industry – while simultaneously prohibiting participation in the national racing market. This is the very antithesis of evenhanded regulation, and the Supreme Court has explicitly stated that a statute that burdens interstate commerce cannot be brought into harmony with the Constitution "by the circumstance that it

enterprise), and its effects are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Pike, supra 397 U.S. at 142.

Because the lower courts incorrectly found that the Regulation does not discriminate against interstate commerce, they partially analyzed Article 6 under the Pike test, and the trial court concluded that the Regulation "serves a legitimate public purpose in stabilizing the market for the sale of horses and promoting competitive races." (Order, R.A. at 265; Appellate Order at pp. 11). Furthermore, the lower courts ignored the prerequisite to the Pike test that the burden on interstate commerce imposed by a regulation must be incidental instead of direct.

Merriam-Webster's Dictionary defines "incidental" as "being likely to ensue as a chance or minor consequence," or "occurring merely by chance without intention or calculation." Id. In contrast, Article 6 – by its very terms – explicitly attempts to block the flow of commerce at the Commonwealth's borders, and importantly, the KHRC has readily acknowledged that the Regulation is intended and designed to keep horses inside the Commonwealth for the benefit of the local racing industry. (See Cross-Motion for Summary Judgment, R.A. at 125, in which the KHRC admits that the "Regulation seeks to prevent the uncontrolled transfer of Thoroughbred horses out of Kentucky and tries to ensure that Thoroughbred horses are available to race inside the Commonwealth.").

In other words, nothing about Article 6 entails an incidental burden on interstate commerce: the burden is the explicit, direct, and intended consequence of the Regulation, the object of which specifically relates to private interests, not the act of governance.

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purports to apply alike to the citizens of all the states, including itself." See Fort Gratiot, supra 504 U.S. at 362.

Accordingly, the trial court and Court of Appeals should not have entertained the Pike analysis, but instead should have concluded that the Regulation is discriminatory and subject to the per se rule of invalidity. See Philadelphia, supra 437 U.S. at 617 (stating that the Pike analysis only applies in instances where there is no patent discrimination against interstate trade; and that laws which block an article of commerce at the State's borders are the "clearest example" of legislation subject to the rule of per se invalidity).

b. The Regulation Is Not Subject To The Market Participant Exception To The *Per Se* Rule Of Invalidity.

In United Haulers, supra, 550 U.S. 330 (2007), the Supreme Court described an exception to the restrictions imposed by the dormant Commerce Clause whereby the States, when acting as a market participant or performing certain public governmental functions, can enact regulations which discriminate against interstate commerce so long as the regulations favor a public entity as opposed to private business. Similarly, in Davis, supra, 553 U.S. 328 (2008), the Court held that in some circumstances, a traditional government function is "not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from simple economic protectionism the Clause abhors." Id. 550 U.S. at 341-42. However, the KHRC is not a "market participant" as defined by the Supreme Court, nor does the Regulation concern a traditional government function in the sense identified by the United States Supreme Court.[11]

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11 The trial court correctly concluded that in this instance, Kentucky "is not a market participant as that term has been used in cases under the Commerce Clause." (See Order, R.A. at 260). However, as described infra, it incorrectly interpreted Supreme Court precedent when it determined that "the pervasive role of the state in regulating the horse racing industry meets the broad criteria for traditional government function contemplated by the Supreme Court." Id.

A State acts as a "market participant" when it participates in the market as a buyer and seller of goods and services, rather than as a market regulator. See S-C Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 93 (1988). There is no evidence in the record that the KHRC participates in the local Thoroughbred claiming market by buying or selling Kentucky Thoroughbreds. Rather, by controlling the flow of claimed Thoroughbreds outside of Kentucky, the KHRC is acting as a market regulator, and the "market participant" exception does not apply. See id.[12]

II. THE LOWER COURTS WRONGFULLY AND UNJUSTIFIABLY APPLIED A "TRADITIONAL GOVERNMENT FUNCTION" TEST TO UPHOLD THE UNCONSTITUTIONAL REGULATION.

Finally, and most importantly, the lower courts' conclusion that the Regulation concerns a traditional government function – and is therefore exempt from traditional dormant Commerce Clause scrutiny – is grossly misplaced. In this case, by the KHRC's own admission, the object of the Regulation (keeping newly claimed horses inside Kentucky) operates to support the local horse racing industry – a purely private, albeit highly regulated, enterprise that competes nationally and internationally for access to horses, patrons, and their gambling and purchasing proceeds. The preference for local horse racing posed by the Regulation does not serve or advance a governmental obligation – it serves and advances a local private industry that is regulated by the government. The Supreme Court does not allow exceptions to the Commerce Clause simply because a State has chosen to regulate private businesses or their activities – if it did, the entire dormant Commerce Clause jurisprudence would be rendered a nullity. Indeed, as described below, the lower courts' support of Article 6 on the grounds that the

12 While the lower courts did not appear to dispute this point, Jamgotchian felt it was appropriate to reiterate it given this Court's de novo review of the issues now before it.

regulation of horse racing in Kentucky is a "traditional government function" is based on flawed reasoning which has been explicitly rejected by the United States Supreme Court.

In its analysis, the Court of Appeals found that because the Regulation involves a "traditional government function" (specifically, that the KHRC's regulation of horse racing in and of itself is a traditional government function), the Regulation is not subject to the rigorous scrutiny generally applied to economically protectionist laws that favor in-state interests, and therefore upheld the Regulation as a legitimate exercise of the Commonwealth's police power. See Appellate Order at pp. 9-10. Specifically, the Court of Appeals stated that ". . . the first step in determining the constitutionality of the Regulation is deciding whether it involves a traditional government function[,]" and it then used the "traditional government function test" as a bright-line rule for exempting the Regulation from the rigorous scrutiny normally applied by the United States Supreme Court to regulations that discriminate against the free flow of interstate commerce. See Appellate Order at p. 6. As stated by the Supreme Court in Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93 (1994), "[i]f a restriction on commerce is discriminatory, it is virtually per se invalid[,]" invoking the strictest of scrutiny. Id. at 99 (citing Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344 n.6 (1992)).

In applying the "traditional government function" analysis, the Court of Appeals overlooked and blatantly ignored the legal authority contained in Jamgotchian's Reply Memorandum in support of his Appeal, in which the United States Supreme Court ruled out the "traditional governmental function" test as a dispositive rule of adjudication for Commerce Clause cases:

> Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.
> ...
> Indeed, the "traditional" nature of a particular governmental function can be a matter of historical nearsightedness; today's self-evidently "traditional" function is often yesterday's suspect innovation.
> ...
> There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental . . . We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 544 n.9, 546-47 (1985). While the United States Supreme Court has clearly rejected the notion that differentiation between "traditional" and "non-traditional" government functions can be a dispositive rule of adjudication, certain cases cited herein such as United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) and Dep't of Revenue v. Davis, 553 U.S. 328 (2008) have allowed discriminatory regulations to survive where laws pertaining to government functions (e.g., waste management, see United Haulers) or governmental market participation (e.g., issuance of bonds, see Davis) favor the government's provision of actual public services (i.e. governmental activities) rather than favoring local private interests which provide no known public services and do not serve a governmental purpose. See Davis, supra at 343. Again, as described by Justice Souter in Davis:

> The point of asking whether [a] challenged governmental preference operate[s] to support a traditional public function [is] not to draw fine distinctions among governmental functions, but to find out whether the preference [is] for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local. Under United Haulers, governmental public preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other.
>
> Davis, supra 553 U.S. at 341 n.9 (citations omitted).

In other words, because Article 6 is designed to only benefit private and local commercial interests, the distinction of whether the regulation of horse racing in Kentucky is a "traditional government function" is totally irrelevant. A regulation that favors private economic interests in Kentucky, such as enhancing revenue at local Kentucky racetracks and other private Kentucky enterprises, is simply not permitted under the Supreme Court's Commerce Clause analysis. Indeed, the KHRC readily admits that the Regulation is designed primarily to benefit local private economic interests.[13] The Court of Appeals likewise acknowledged the Regulation's purpose as an economic safeguard for the local Thoroughbred industry, and further admitted that the Commonwealth of Kentucky is not a market participant in horse racing. See Appellate Order at pp. 6-8. Accordingly, the Regulation can only be analyzed under the standard dormant Commerce Clause protocol,[14] and is wholly unconstitutional. See Davis, supra

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13 Specifically, the KHRC admits that the Regulation prevents ". . . the uncontrolled transfer of thoroughbred horses out of Kentucky in order to ensure larger fields of horses[;]" and that "[l]arger fields resulting from the Regulation generate more revenue at Kentucky race tracks . . . [c]umulatively, this leads to higher purses for owners . . . which in turn translates to additional revenues for farm wages, equipment, and other improvements." Respondents' Appeal Brief at 21-22.

14 Contrary to the analytical framework adopted by the Court of Appeals which focuses on the unworkable "traditional government function" test, the Supreme Court has made it clear that the proper dormant Commerce Clause analysis involves the two-tiered approach described in Jamgotchian's Appeal Brief, where the Court "first ask[s] whether [a regulation] discriminates on

553 U.S. at 347-48 (stating that cases involving "market regulation without market participation prescribe standard dormant Commerce Clause analysis"). This is true even though Jamgotchian's participation in claiming races is entirely voluntary, because the states cannot include or enforce unconstitutional provisions in their own laws, or place unconstitutional restrictions on the conduct of citizens – regardless of the voluntary nature of such conduct (e.g. obtaining a drivers license or participating in a claiming race).

By choosing to address the case based on whether the Regulation relates to a "traditional government function," the Court of Appeals has patently ignored the Supreme Court's holding in Garcia, supra, in which the High Court unambiguously rejected, ". . . as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" Id. at 546-47. Nevertheless, the Court of Appeals wrongfully adopted such a rule; placed it at the forefront of its analysis; and without judicial precedent or other legal support, found that "[w]hile [Kentucky] is not a market participant as that term has been used in other cases under the Commerce Clause, there can be little doubt that the pervasive role of the state in regulating the horse racing industry meets the broad criteria for traditional government function contemplated by the Supreme Court." See Appellate Order at p. 7. Given that the Supreme Court has explicitly rejected any broad criteria for, or a rule of decision based on, whether a Regulation concerns a "traditional government function," the ruling of the Court of Appeals is particularly suspect, and should be reversed by this Court. See Garcia, supra,

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its face against interstate commerce." See United Haulers, supra at 338. Such discriminatory regulations are per se invalid.

469 U.S. at 546-47 (rejecting the "traditional government function" test as a dispositive rule of state immunity from federal regulation).

Even if one were to assume that the "traditional government function" test serves as a dispositive rule for adjudicating dormant Commerce Clause cases – which, as set forth supra, it does not – there is no sound logical basis for the Court of Appeals' conclusion. As stated in its Opinion, the Court of Appeals determined that "[w]hile horse racing itself is not a traditional government function, there can be no question that the regulation of horse racing is, and always has been, a traditional government function . . ." See Appellate Order at p. 7. In other words, the Court of Appeals contends that as long as Kentucky has chosen to enact a scheme for regulating private conduct, such regulations are exempt from scrutiny under the dormant Commerce Clause because the mere act of regulating is a "traditional government function." Not only is this tautological, it is nonsensical and without any rational basis.

As discussed extensively herein, the Court of Appeals' logic completely nullifies the limits prescribed by the dormant Commerce Clause. If the mere act of regulation can qualify as a "traditional government function," it would be impossible for the dormant Commerce Clause to have any practical effect, as discriminatory laws could evade constitutional scrutiny if the state simply points to the fact that it has chosen to regulate as an exercise of its police power. Obviously, no Supreme Court case has ever reached this implausible conclusion, and the cases that do examine the notion of a "traditional government function" address the governmental object of the regulation (such as waste collection or taxation), not the act of regulating in and of itself. See Davis, supra 553 U.S. at 341 n.9 ("The point of asking whether [a] challenged governmental preference

operate[s] to support a traditional public function [is] not to draw fine distinctions among governmental functions, but to find out whether the preference [is] for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local."); United Haulers, supra 550 U.S. at 343.

The Court of Appeals acknowledges in its Opinion that horse racing is not a traditional government function, therefore, it is impossible for the object of the Regulation to be for ". . . the benefit of a government fulfilling governmental obligations." See Davis, supra. On the contrary, the Regulation is clearly designed and written to benefit the Kentucky horse racing industry – a private industry that serves no governmental or public purpose whatsoever. Article 6 is therefore impermissibly discriminatory under the dormant Commerce Clause and must be invalidated.

CONCLUSION

While Article 6 is patently discriminatory in both purpose and effect, it is not necessary to look beyond the text of Article 6 to determine that it benefits only in-state economic interests and substantially burdens out-of-state interests. Again, under the Regulation, owners who claim Thoroughbred racehorses in Kentucky can only race their horses in Kentucky, at privately owned and operated Kentucky racetracks, paying entry fees that benefit local economic interests (the private tracks where the horses race, the employees of such facilities, the parties who collect the entry fees) until the "claiming jail" period has expired. In the case of ROCHITTA, Jamgotchian was prohibited from racing his horse in any State but Kentucky for a period beginning April 30, 2011, and ending July 4, 2011. (R.A. at 81). In contrast, the plain terms of Article 6 would have

only allowed Jamgotchian to race ROCHITTA in Kentucky without restriction at the meet in which he claimed the horse. See 810 KAR 1:015, § 1, Article 6(b).

This is obvious and outright discrimination against interstate commerce, and the offending Regulation cannot be saved by application of a "traditional government function" test – a test that the Supreme Court has rejected as a dispositive rule of adjudication and which was grossly misapplied by the courts below. The United States Constitution, through the Commerce Clause, invalidates ". . . local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state." See generally C&A Carbone, supra 511 U.S. at 390 (emphasis added). Jamgotchian therefore respectfully requests that the Court reverse the Opinion of the Court of Appeals, and find the Regulation to be unconstitutional and unenforceable in all aspects.

Respectfully submitted,

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